

In the United States Bankruptcy Court
for the
Southern District of Georgia
Augusta Division

In the matter of:

WILLIAM ARTHUR GREENE, JR.
(Chapter 11 Case 89-11460)

Debtor

EVERGREEN FOODS, INC., and
WILLIAM A. GREENE, JR.

Plaintiffs

v.

THOMAS J. LIPTON COMPANY

Defendant

And

EVERGREEN FOODS, INC.
(Chapter 11 Case 89-10440)

Debtor

EVERGREEN FOODS, INC., and
WILLIAM A. GREENE, JR.,

Plaintiffs

v.

THOMAS J. LIPTON COMPANY

Defendant

Adversary Proceeding

Number 89-1096

Adversary Proceeding

Number 89-1097

MEMORANDUM AND ORDER

I. BACKGROUND

The complaints in the above cases seek a determination that the settlement of a previously pending lawsuit in the United States District Court for the Southern District of Georgia before the Honorable Dudley H. Bowen, Jr., constituted a voidable preference under 11 U.S.C. Section 547 or a fraudulent conveyance under Section 548.

The previous litigation was filed in February, 1988, seeking a thirty seven million dollar recovery for breach of contract. Evergreen Foods, Inc. v. Thomas J. Lipton, Inc., CV# 188-055. In the complaint it was alleged that in December, 1986, the parties entered into a contract whereby Plaintiff was to produce ten ounce fruit juice in glass bottles (the "chugger program or project"). It was further alleged that the contract required Evergreen to produce a minimum of 300,000 cases of juice each year, increasing 15% annually thereafter; and that Lipton had breached the contract by failing to pay for goods it had ordered and failing to order additional product produced by Evergreen as required by the contract.

After discovery was completed in that case, a pre-trial conference was scheduled in the District Court. The parties entered into an Amended Consolidated Pre-Trial Order (Exhibit "A" to Document 78A in Adversary Proceeding #89-1097, as amended by letter from Defendant's counsel dated January 21, 1991). In that proposed pre-trial order Evergreen Foods contended:

Evergreen and Lipton made an agreement and entered into a contract in December of 1986 which called for Evergreen to bottle and produce for sale to Lipton certain fruit juice and juice-flavored drinks under a Lipton/Sunkist label. The Agreement called for the Evergreen to fill such orders as required by Lipton, which production was to be at a minimum of 300,000 cases the first year (1987), with the minimum to increase at a rate of no less than fifteen (15%) percent each subsequent year. Evergreen was entitled to produce and sell the product only to Lipton which held a license franchise agreement permitting it and its designated marketing representative to manufacture products bearing the Sunkist trademark or label.

During the first year of production Lipton forwarded purchase orders to Evergreen for 1.2 million cases of the bottled juice drink products and 334,000 cases were in fact produced. Upon production and sale to Lipton, payment was to be received by Evergreen within twenty (20) days, which payment period was later reduced by agreement of the parties to ten (10) days.

After Evergreen expended considerable effort and funds to enable it to fulfill its (sic) obligations under the contract, Lipton breached the contract as evidenced by non-payment and late payment of money due; by refusal upon request to provide adequate assurances to Evergreen that Lipton would abide by the contract and make timely payment as to future production; by refusing to authorize further production under the contract; by making unauthorized deductions from monies owed Evergreen and, by failing to make good faith efforts in aid of the program.

As a consequence of the breach of contract, Evergreen contends it is entitled to recover the value of the lost future production on this long term contract.

Lipton on the other hand contended:

The contract was not a contract for the sale of goods, but instead was a unique contractual arrangement in the nature of a distributorship agreement. Title to the product was not to pass from Evergreen to Lipton.

The aim of the contract was to establish a new line of Sunkist juice products, to be sold in ten ounce "chugger" bottles through a network of beer distributors. This concept was developed and brought to Lipton as a proposal by Evergreen. The contract provided that Evergreen was to sell the product to beer distributors. When Evergreen received a firm order from a beer distributor, then Evergreen would invoice Lipton for Evergreen's price for the product, and Lipton would invoice the distributor for the price of the product to the distributor, which was agreed to be Evergreen's price, plus twenty-five percent markup to Lipton. The actual dollar price of the product was set by Evergreen, and Lipton accepted Evergreen's number as the number used in the written contract. The only way provided in the contract for the price to be changed was by a change in Evergreen's price, since Lipton's price was always to remain twenty-five percent over Evergreen's price.

Under the contract, Evergreen was to use its best efforts to promote and sell the product. However, the contract provided that Lipton would have the option of assuming this responsibility itself if it desired to do so. Lipton did this at the end of August or early September, 1987. Prior to that time, the contract placed sole responsibility for the promotion of the product on Evergreen.

Lipton was never obligated under the contract to pay for any product for which orders had not been received from distributors. During 1987, Evergreen represented to Lipton that, in order to facilitate the introduction of a complimentary sixteen ounce line, it needed to build up an inventory of ten ounce "chugger" products to fulfill the great demand which supposedly would occur while Evergreen's facilities were diverted to the production of the sixteen ounce product. This representation was false and known to be false by Evergreen, since, although Evergreen had sold a large quantity of the chugger product in the initial rollout period, it had received practically no reorders and knew that the product was not selling to retailers and consumers. Lipton had repeatedly sought verification of Evergreen's claims that the program was doing very well, but Evergreen had failed and refused to provide it. By means of this representation, Evergreen induced Lipton to agree to pay Evergreen for a certain quantity of product for which firm orders had not been received.

Lipton contends that this contract is governed in its entirety by the general contractual law of the State of New York and that the Uniform Commercial Code does not apply because the contract was one for services rather than an agreement for the sale of goods. Where a contract is predominantly one for services, rather than a sale of goods, New

York courts do not apply the U.C.C. Milau Associates, Inc. v. North Avenue Development Corp., 42 NYS 2d 482, 368 NE 2d 1247 (NY 1977) Dynamius Corp. of America v. International Harvester Co., 429 F.Supp. 34 (SDNY 1977). On the issue of reasonable assurances, Lipton contends that it gave all reasonable assurances required by law. Evergreen refused to produce product unless Lipton agreed, contrary to the contract, to buy a certain minimum volume of product from Evergreen, even if there were no orders from distributors. See description of Lipton's Counterclaim hereinbelow.

Lipton contends that under general New York law, even if Lipton had breached the contract (which is denied), Evergreen would not be entitled to damages for lost profits. Even if Evergreen were entitled to damages for lost profits, these would be limited to much less than is being sought by Evergreen in this action, whether under the UCC or otherwise. This issue has been argued by Lipton in its Brief in Support of Motion for Summary Judgment heretofore filed. In addition, even if Evergreen were entitled to lost profit damages, it would not be entitled to recover for overhead expenses. A. Lenobel, Inc. v. Senif, 300 N.Y.S. 226 (N.Y. Supp. 1937), resettled 1 N.Y.S. 2d 1022 (1938).

Lipton also counterclaimed for losses allegedly sustained as a result of Evergreen's breach of its duties under the contract.

On January 9, 1989, the case was pre-tried by the District Court. On January 12, 1989, the Court considered arguments on the Motion for Partial Summary Judgment of Lipton. Early in the hearing the status of settlement was discussed. At that point, Lipton had offered \$400,000.00 and Evergreen's demand had been reduced to 6.5 million (Transcript of January 12, 1989, 11:00 o'clock session, pages 8 and 9, Document 15 in Adversary Proceeding #89-1097).¹ Judge Bowen directed counsel for Lipton "to get a little more authority. I want you to get a half million dollars and leave it on the table until 6:00 o'clock tonight" (Transcript page 10). Counsel, Mr. Warlick, reported shortly thereafter that he had authority to settle for \$500,000.00 and Judge Bowen announced that offer in "full and final settlement of all claims and the dismissal of all counterclaims" was outstanding until 6:00 o'clock and involved a dismissal of everything to everybody "to the maximum extent conceivable and permitted in the law." (Transcript, 11:00 o'clock a.m., session, page 17). Lengthy argument ensued on all aspects of this very complex and difficult case. Late in the date the Court reconvened and announced its ruling on the Summary Judgment Motion from the bench into the record. Judge Bowen characterized the contract as an interpretational "abomination," and "imperfect" (Transcript of

¹ The court reporter's transcript for the 11:00 o'clock session shows the date as January 9, 1989. This must be in error. The pre-trial conference was held January 9, 1989. The proceedings for the Motion for Partial Summary Judgment took place on January 12, 1989, the date Judge Bowen suggested the \$500,000.00 settlement figure. The Court session which resumed at 4:00 o'clock in the afternoon is properly designated as commencing on January 12, 1989.

January 12, 1989, page 3). He concluded that it "could not have been a clearer invitation for a lawsuit" as a result of its vagueness and ambiguity in some areas. Nevertheless he found that there was no ambiguity on the question whether "Lipton is obligated to purchase from Evergreen any number of thousands of cases of product, much less 300,000 cases." (Transcript of January 12, 1989, 4:00 o'clock p.m., session, page 4). He also ruled that the contract was not one for the sale of goods but rather constituted a distributorship, franchise or license for Evergreen (Transcript, 4:00 o'clock p.m., session, page 7). As to the "clearest issue" for resolution, he applied New York law which required that in order to recover for lost profits "it must be demonstrated with certainty that such damages have been caused by the breach and second the alleged loss must be capable of proof with reasonable certainty." (Transcript, 4:00 o'clock p.m., session, page 9). Based on all the evidence he ruled that the damages sought were too speculative to be recovered:

Next if it is a new business seeking to recover for lost future profits the burden is stricter for the reason that it must have the ability to estimate lost profits with the requisite degree of certainty. We have a relatively new product, a new business an unconventional business arrangement between a licensee and manufacturer, who also stands as a distributor for the licensee. We have no agreement by the licensee who, in a normal or titular way or ostensible way, is the seller of the goods to purchase any specific or ascertainable number of cases of the product. The agreement only provides that the relationship will remain in effect so long as Evergreen produces and sells a certain number of cases. In the context of this new venture, this new concept, a new business, with a new product, in an unconventional relationship, I see no basis whatsoever on which I can fairly conclude that, on the record of this summary judgment motion, the plaintiff has shown me the elements that are necessary to avoid this prohibition on the recovery of lost future profits and I do specifically determine that the claim, which is made for those profits, is quite to the contrary and demonstrates that they are of a speculative nature.

This covers what I have heard today and we will reconvene tomorrow at 11:30 to work out the remaining matters that have not been covered to this point.

I will enter a very brief order which will simply resolve these issues. I do not expect that it will contain a statement of the reasons given. The reasons given will be found in the record of the proceeding as given from the bench. (Transcript, 4:00 o'clock p.m., session pages 9-10).

Thereafter on January 24, 1989, the parties filed a "Motion for Leave to File Dismissal" and a "Dismissal with Prejudice" which Judge Bowen "approved" and filed on January 27, 1989 (CV# 188-0055). (See attachments to Document #15 in Adversary Proceeding # 89-1097, Defendant's Motion for Summary Judgment, filed March 12, 1990). The consideration exchanged was \$500,000.00 paid by Lipton to Evergreen, the amount specifically suggested by Judge Bowen as a reasonable settlement figure.

On March 29, 1989, an involuntary Chapter 7 case was filed against Evergreen Foods, Inc., which later consented to a voluntary order for relief under Chapter 11. William Arthur Greene, Jr., filed his voluntary Chapter 11 petition on September 27, 1989. Plaintiffs as debtors-in-possession then commenced these adversary proceedings to set aside the previous settlement.

In its responsive pleadings in this Court Lipton asserts that Greene individually has no standing since any violation would have been strictly between Lipton and Evergreen products. The sixth defense raises the defenses of accord and satisfaction, release and payment based on the settlement of the District Court litigation. Other defenses likewise raise issues of estoppel as a result of that settlement.

The Plaintiffs have responded at least in part by stating that the settlement of the previous District Court litigation was for less than reasonably equivalent value and was under duress because of the financial position of Mr. Greene and Evergreen, and have alleged that the settlement was induced by fraud.

Lipton responds that if the settlement was obtained through fraud that issue should be addressed to the District Court as part of an extraordinary motion to set aside the District Court judgment under F.R.Civ.P. 60(b). Lipton contends that Evergreen is bound by the settlement under principals of *res judicata* or collateral estoppel from relitigating any aspect of the contract case, including the issue of reasonableness of the value of the settlement and that Greene individually is likewise barred under the authority of Hyman v. Regenstein, 258 F.2d 502 (5th Cir. 1958) cert. denied, 359 U.S. 913, 79 S.Ct. 589, 3 L.Ed.2d 575 (1959), from now asserting that the dismissal with prejudice approved by Judge Bowen was not binding on him individually.

Lipton has filed and supplemented a Motion for Summary Judgment to which Plaintiffs have responded. The Court has now considered the entire record, the briefs, and the oral argument heard on May 28, 1992, and concludes that Defendant's Motion should be granted.

II. CONCLUSIONS OF LAW

Bankruptcy Rule 7056 incorporates Fed.R.Civ.P. 56 which provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

The moving party bears the initial burden of showing the absence of any genuine issue of material facts. Bald Mountain Park, Ltd. v. Oliver, 863 F.2d 1560 (11th Cir. 1989). The movant should identify the relevant portions of the pleadings, depositions, answers to interrogatories, admissions, and affidavits to show the lack of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The moving party must support its motion with sufficient evidence and "demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute . . . " U.S. v. Twenty (20) Cashier's Checks, 897 F.2d 1567, 1569 (11th Cir. 1990) (quoting Clemons v. Dougherty County, Ga., 684 F.2d 1365, 1368-69 (11th Cir. 1982).) *See also* Adickes v. S.H. Kress & Co., 398 U.S. 144, 160, 90 S.Ct. 1598, 1609-10, 26 L.Ed.2d 142 (1970). The trial court should not weigh the evidence or make credibility determinations when deciding a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Once the movant has carried its burden of proof, the burden shifts to the non-moving party to demonstrate that there is sufficient evidence of a genuine issue of material fact. *See also* U.S. v. Four Parcels of Real Property, 941 F.2d 1428, 1438 (11th Cir. 1991); Livernois v. Medical Disposables, Inc., 837 F.2d 1018, 1022 (11th Cir. 1988); Kramer v. Unitas, 831 F.2d 994, 997 (11th Cir. 1987).

Summary judgment is proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex, 106 S.Ct. at 2552. *See also* Brockington v. Certified Elec. Inc., 903 F.2d 1523, 1527 (11th Cir. 1990) (adopting the relevant portions of the District Court order and affirming S.D. Ga., No. CV288-111, April 18, 1989, Alaimo, Chief Judge).

A non-moving party cannot rely on merely allegations, pleadings and legal conclusions. *See* Celotex, 106 S.Ct. at 2553, Anderson v. Liberty Lobby, Inc., 106 S.Ct. at 2510; Livernois, 837 F.2d at

1022. *See generally* Avirgan v. Hull, 932 F.2d 1572 (11th Cir. 1991). The non-moving party must come forth with some evidence to show that a genuine issue of material fact exists. U.S. v. Four Parcels of Real Property, 941 F.2d at 1438.

The trial court "must consider all the evidence in the light most favorable to the non-moving party," Rollins v. TechSouth, Inc., 833 F.2d 1525, 1528 (11th Cir. 1987), and "resolve all reasonable doubts in favor of the non-moving party." Barnes v. Southwest Forest Indus., Inc., 814 F.2d 607, 609 (11th Cir. 1987). *See also* Earley v. Champion Intern. Corp., 907 F.2d 1077 (11th Cir. 1990); Brockington v. Certified Elec. Inc., 903 F.2d at 1527. "The requirement is that there be no genuine issue of a material fact." Anderson, 477 U.S. at 247-48, 106 S.Ct. at 2510 (emphasis original). *See also* Martin v. Baer, 928 F.2d 1067 (11th Cir. 1991).

Evergreen and Mr. Greene argue that the settlement and ensuing transactions between Evergreen, the debtor-in-possession, and Lipton should be avoided as a preference under 11 U.S.C. Section 547, and alternatively, that any property transferred by the Debtor as a result of the settlement should be set aside as a fraudulent transfer under 11 U.S.C. Section 548 because reasonably equivalent value was not received by the Debtor in the exchange.

A. Section 547 Preference Claims

Under 11 U.S.C. Section 547, certain transfers to creditors may be avoided as a preference. In order to constitute a preference under Section 547(b), the court must find the following prerequisites:

- 1) A transfer of the interest of the debtor in property;
- 2) To or for the benefit of a creditor;
- 3) For or on account of an antecedent debt owed by the debtor incurred before the transfer;
- 4) Made while the debtor was insolvent;
- 5) Within 90 days of the filing of bankruptcy (unless the one year period is applicable); and
- 6) Which enables the creditor to receive more than it would have received in a Chapter 7.

The debtor-in-possession, standing in the shoes of the trustee, has the burden of proving the elements of a preferential transfer. Section 547(g). In re Bullion Reserve of North America, 836 F.2d 1214 (9th Cir. 1988). Each of the six factors listed above must be present. If any one of the factors is missing, then the transfer cannot be considered a preference.

If all the elements of a preference are established nevertheless the debtor-in-possession does not prevail if one of the exceptions of 11 U.S.C. Section 547(c) is applicable. That provision reads in relevant part:

(c) The trustee may not avoid under this section a transfer--

(1) to the extent that such transfer was

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

Even if I were to conclude that the transfer was preferential, Plaintiff cannot recover under Section 547 because I find that the settlement constituted a contemporaneous exchange for new value under Section 547(c)(1)(A) and (B). Debtor received new value in the sum of \$500,000.00 in exchange for releasing its claims against Lipton. Given the facts and circumstances surrounding the exchange, I conclude that the new value given was adequate to meet the contemporaneous exchange requirements. Debtor's argument that its claims were worth more than the \$500,000.00 received and that the settlement should be avoided must be asserted under Section 548.

The Third Circuit has ruled that payments in settlement of a lawsuit are not voidable as a preference. In Lewis v. Diethorn, 893 F.2d 648 (3rd Cir. 1990), the debtor, a developer and home builder, made payments to the Diethorns in satisfaction of the Diethorn's claims that defective wood siding had been installed on the home. The trustee filed an adversary proceeding to recover the payments as a preference. The Bankruptcy Court and the District Court found an avoidable preference. The Third Circuit reversed, holding

that there was no antecedent debt as debtor was not receiving freedom from liability on an antecedent debt but freedom from pending litigation as well as an increase in the value of the house on which the Diethorns had filed a notice of *lis pendens*. The court thus found the transaction to be a contemporaneous exchange for new value.

The case before me is even stronger because, rather than paying money in settlement of a case, the debtor received substantial funds in exchange for dismissal of its claims (the allegedly voidable transfer). The receipt of \$500,000.00 clearly constitutes "new value given to the debtor" and debtor's dismissal of the lawsuit obviously occurred simultaneously with the agreement that those sums would be paid. I therefore conclude the contemporaneous exchange exception of Section 547(c) is established and that as a matter of law, no voidable preference recovery is authorized.

B. Section 548 Fraudulent Transfer Claims.

1. General Requirements Under Section 548.

Debtor's second theory of recovery is premised upon 11 U.S.C. Section 548 which provides in pertinent part:

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor . . .

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of the transfer or obligation;

Under Section 548, this Court must find the following elements in order to avoid the transfer as fraudulent:

- 1) A transfer of an interest of the debtor in property;
- 2) In which the debtor receives less than reasonably equivalent value;
- 3) At a time when the debtor was insolvent; and

4) Made within one year of filing bankruptcy.

The trustee, the debtor-in-possession here, has the burden of proving each element of a fraudulent transfer under Section 548. In re Rodriguez, 895 F.2d 725, 726 n.1 (11th Cir. 1990). The Rodriguez decision defined reasonable equivalency as a tool to prevent depletion of a bankrupt's estate but does not authorize setting aside a transfer which confers an economic benefit on the debtor. Id. at 727. The question of determining reasonably equivalent value is a question of fact. In re Ozark Equipment, 850 F.2d 342 (8th Cir. 1988).

Section 548 requires a transfer of an interest of the debtor in property. "Transfer" is to be interpreted in its most comprehensive sense and is intended to encompass every means by which property can pass from the ownership and possession of another including voluntary transfers and involuntary judicial transfers. In re Thrifty Dutchman, 97 B.R. 101 (Bankr. S.D.Fla. 1988). See 11 U.S.C. §101(54)[58].² The voluntary settlement of a lawsuit constitutes a transfer under Section 547(b) and should likewise be considered a transfer for purposes of Section 548. See generally Lewis v. Diethorn, 893 F.2d 648 (3rd Cir. 1990) and the discussion above. The pursuit of a valid claim or cause of action brings with it the possibility of producing additional funds for the estate. An interest of the debtor in property can be anything the debtor could have used to satisfy the claims of creditors. In re Bullion Reserve of North America, 836 F.2d at 1217. This necessarily includes claims held by the debtor. See 11 U.S.C. §541(a)(1). Indeed, Evergreen received "value" in the amount of \$500,000.00 in exchange for settlement of its claims, which was used to provide funds for the estate. I hold that Evergreen's settlement and its release of its claims against Lipton was a "transfer" of "property."

Second, Debtor must receive "less than a reasonably equivalent value" for the property exchanged. Debtor released its breach of contract claims against Lipton in exchange for Lipton's payment of \$500,000.00. The central issue under Section 548(a)(2)(A) is whether the value of Evergreen's claims was reasonably equivalent to the \$500,000.00 Evergreen received.

² The subsection defining "transfer" is currently designated as Section 101(54). However, due to additions and changes in the definitions, "stockbroker" is also designated as Section 101(54). The section defining transfer should have been redesignated as Section 101(58) by Pub. L. No. 101-647, §2522(e)(1), Nov. 29, 1990, but the drafters failed to consider the renumbering of 11 U.S.C. Section 101 that occurred in Pub.L. No. 101-311, §§101(1) and 201(3), June 25, 1990. See Norton Bankr. Code Pamphlet, 1991-1992 Ed., p.69.

2. *Res Judicata* and Section 548.

Lipton argues that the settlement and the District Court's approval of the dismissal with prejudice of the suit against it is *res judicata* barring all of Evergreen's claims in this adversary proceeding. In the Eleventh Circuit, *res judicata* or claim preclusion bars:

. . . relitigation of matters that were litigated or could have been litigated in an earlier suit . . . In order for the doctrine of *res judicata* to bar a subsequent suit, four elements must be present: (1) there must be a final judgment on the merits; (2) the decision must be rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, must be identical in both suits; and (4) the same cause of action must be involved in both cases. [citations omitted]

I. A. Durbin, Inc. v. Jefferson National Bank, 793 F.2d 1541, 1549 (11th Cir. 1986). *Res judicata* bars litigation of matters that could have been litigated in an earlier suit, but were not. Pelletier v. Zwiefel, 921 F.2d 1465 (11th Cir. 1991). See also In re Justice Oaks II, Ltd., 898 F.2d 1544, 1548 (11th Cir.) cert. denied, ___ U.S. ___, 111 S.Ct. 387, 112 L.Ed.2d 398 (1990); Citibank, N.A., v. Data Lease Fin. Corp., 904 F.2d 1498, 1501 (11th Cir. 1990).

First, the Court must find a "final judgment on the merits." A suit which has been dismissed with prejudice pursuant to settlement is a final judgment and the basis for a procedural bar. Lawlor v. National Screen Service Corp., 349 U.S. 322, 327, 75 S.Ct. 865, 868, 99 L.Ed. 1122 (1955); United States v. Parker, 120 U.S. 89, 95, 7 S.Ct. 454, 458, 30 L.Ed. 601 (1887); Pelletier v. Zwiefel, 921 F.2d 1465 (11th Cir. 1991). See Citibank N.A., v. Data Lease Financial Corp., *supra* (Dismissal with prejudice of debtor's claim against agents of creditor pursuant to stipulated settlement incorporated into court order was *res judicata* and judgment on the merits despite parties intent, where debtor did not obtain creditor's consent to reservation of rights against the creditor); Brooks v. Barbour Energy Corp., 804 F.2d 1144 (10th Cir. 1986) (A voluntary dismissal with prejudice upon an order of the court, based on a settlement agreement, should be considered a judgment on the merits; such a dismissal with prejudice by stipulation and approved by the court is *res judicata* - barring a later lawsuit on the same transaction or occurrence). Judge Bowen's approval of the dismissal with prejudice is clearly sufficient to constitute a judgment on the merits for purposes of *res judicata*.

The second factor, jurisdiction of the District Court, is not in dispute.

Third, the parties, or those in privity with them, must be the same in both suits. Lipton and Evergreen were the parties in the first district court suit and are parties in this adversary. The third factor is present as to Evergreen and Lipton.

Lipton claims that Mr. Greene is also barred by *res judicata* from bringing his own claims in this adversary. Lipton claims that Mr. Greene as CEO and as primary shareholder of Evergreen controlled Evergreen and participated in the first litigation to the extent that *res judicata* should be applied against him. Lipton cites Hyman v. Regenstein, 258 F.2d 502 (5th Cir. 1958) as authority for the assertion. I agree. Although the Court in Hyman employed collateral estoppel in behalf of a defendant in an action whose corporation had successfully litigated with Hyman previously, its rationale on the issue of privity is conclusive against Mr. Greene in this case. Id. at 511-12, n. 5,6. *See also* N.A.A.C.P. v. Hunt, 891 F.2d 1555, 1560-61 (11th Cir. 1990).

Accordingly, the third factor is present as to Mr. Greene.³

Finding the first three requirements for the application of *res judicata* exists as to both Plaintiffs, this Court must determine if the cause of action is the same in both suits. In determining whether the cause of action is the same in both cases, the test is whether the primary right and duty are the same in each case. NAACP v. Hunt, 891 F.2d at 1561; I. A. Durbin, Inc., v. Jefferson Nat'l Bank, 793 F.2d at 1549. The reviewing court must compare the substance of the actions and not their form. Id. at 1549; Matter of Ray, 677 F.2d 818, 821 (11th Cir. 1982); Matter of White, 653 F.2d 147, 150 (5th Cir. 1981). *Res judicata* applies to all legal theories presented in the first action and to all legal theories arising out of the same "operative nucleus of facts." Manning v. City of Auburn, 953 F.2d 1355, 1359 (11th Cir. 1992); Hunt, 891 F.2d at 1561; Olmstead v. Amoco Oil Co., 725 F.2d 627 (11th Cir. 1984) (Fraudulent inducement claim arising out of same

³ Moreover, if privity is found to be lacking, the action brought by Greene individually is still properly dismissed for lack of standing on his part. The wrong alleged was committed against the corporation and may not be asserted by an individual shareholder no matter how injuriously he may have been affected. *See Pelletier, supra*, at 1491 n.60 and cases cited therein.

operative facts as first action barred by *res judicata* in second action).

Res judicata bars litigation of all grounds and defenses available to the parties in the initial lawsuit regardless of whether they were asserted or determined in the prior proceeding. Brown v. Felsen, 442 U.S. 127, 131, 99 S.Ct. 2205, 2209, 60 L.Ed.2d 767 (1979). All claims actually made and all claims which could have been made in the first suit are barred by *res judicata*. In re Justice Oaks II, Ltd., 898 F.2d at 1552.

In the initial lawsuit, Evergreen alleged a breach of contract by Lipton. In this action, Evergreen is asserting claims based on an alleged fraudulent transfer of property to Lipton arising out of dismissal of that case with prejudice. Facially such a claim under Section 548 is distinguishable from the claims asserted earlier in the District Court seeking damages for breach of contract. However, the question remains whether in substance the causes of action are the same. I conclude that they are.

To illustrate, in In re Thrifty Dutchman, Inc., 97 B.R. 101 (Bankr. S.D.Fla. 1988), the creditor/lessee filed a complaint for declaratory and injunctive relief in state court to determine his rights against debtor/lessor regarding an "expired" lease. The state court concluded that the lessee was excused in equity from giving actual notice of renewal of the lease and ordered the debtor to renew the lease at terms much more favorable than market conditions would have permitted if the old lease were treated as expired and debtor was free to demand new terms. The state court entered final judgment on July 16, 1987.

On July 29, 1987, the debtor filed a Chapter 11 bankruptcy petition, and in August of 1987 filed a notice of appeal with the state court. On September 1, 1987, the debtor filed its adversary proceeding against creditor alleging that the final judgment of the state court constituted a "transfer" under 11 U.S.C. Section 101(54)[58], for which plaintiff received less than reasonably equivalent value while insolvent. According to the debtor, the judicial decree constituted an involuntary fraudulent transfer of property avoidable under 11 U.S.C. Section 548(a)(2)(A). The Bankruptcy Court agreed, first holding that *res judicata* was inapplicable. Applying the Eleventh Circuit's standards for *res judicata*, the Bankruptcy court determined that the state court action and the bankruptcy court adversary proceeding did not involve the same cause of action. The state court action involved interpretation of rights under a lease, not assessment of monetary damages, and the adversary revolved around whether that judgment had the effect of depriving the debtor of property in

exchange for less than reasonable value. The court held that all of the elements of a fraudulent transfer under Section 548 were established and ordered the immediate return of the property to the debtor. Thrifty Dutchman, 97 B.R. at 110.

In contrast, this litigation seeks to establish that the prior case was settled for less than "reasonably equivalent value" when it was settled for \$500,000.00. To do so the Plaintiff must show, at the very least, that it held a meritorious claim for breach of contract that, if tried, would yield a recovery in excess of \$500,000.00. To establish such a claim Plaintiff would of necessity be required to prosecute the breach of contract case to judgment. There is no method short of a full trial on the merits to assess the reasonableness of the previous settlement. If the retrial of that case yields a judgment less than \$500,000.00 then, as a matter of law, no transfer for less than reasonably equivalent value occurred when the prior case was settled. If the judgment is higher, then the prior settlement would be held to have fallen short of that standard. No matter what the outcome, the result is that a case previously settled under close court scrutiny would be retried. Thus, although the form of this cause of action (fraudulent transfer) differs from the previous action (breach of contract), in substance this action is fundamentally still a contract case.

I therefore conclude that the causes of action are the same and that the fourth element of *res judicata* is established. To permit Plaintiff to retry this case, after settlement and dismissal with prejudice of its prior case, would amount to nothing less than a "second bite at the apple," the very evil that the principle of *res judicata* is intended to prohibit. It is an essential principle, calculated to insure finality and sanctity of judgments, without which litigation would literally never end. I therefore rule, since all the elements of *res judicata* have been established, that this action should be barred.

Alternatively, even if the bringing of this action is not barred by the doctrine of *res judicata* I conclude, as a matter of law, that Plaintiff cannot prove the previous settlement was for less than reasonably equivalent value. Ordinarily the determination of what is reasonable equivalency is a question of fact. However, this is no ordinary case. Clearly, there may be instances when cases have been settled in which the jurisdiction of a bankruptcy court is legitimately brought to bear. Certainly there may be instances in which settlements of cases by debtors may provide a windfall to the adverse party and may harm creditors by

transferring funds which should be retained or by releasing claims for a pittance. The danger is doubly great where there is no involvement, or only perfunctory involvement by a judicial officer in the settlement.

By contrast, the previous litigation was heard by the United States District Court for the Southern District of Georgia of which this Court is a unit. 28 U.S.C. §151. During that action Judge Bowen was deeply and substantively involved. He had pre-tried the case. He evaluated the settlement value of the case and suggested a reasonable settlement figure to the parties. He announced a ruling denying Plaintiff's potential recovery of lost profits. In addition, he ruled that Lipton had not breached the contract in certain respects, as he could not interpret the contract to require Lipton to purchase any amount of the juice, "much less 300,000 cases." (Transcript of January 12, 1989, page 4). The parties settled the case in the range suggested by the Court which approved the dismissal with prejudice. It is not within the scope of jurisdiction granted to me to review decisions of the United States District Court. Rather that Court reviews on appeal orders of this Court. It would be insupportable to rule that Congress intended, under the guise of Section 548, that I should pass judgment on decisions of the United States District Court. That Court assessed the reasonableness of the settlement when it was made, and there can be no doubt that, as a matter of law, a reasonably equivalent value was received by Debtor upon the dismissal of the prior case.

C. The Issue of Fraud.

1. In the Inducement of the Contract.

Plaintiffs allege in Count I "Fraudulent Representation of Intent to Perform." It is alleged that Lipton induced Evergreen to undertake the chugger project despite Lipton's knowledge that (a) it could not perform the contract without violating the Sunkist agreement, or (b) it had no intention of performing. It is alleged that these false representations induced Evergreen to enter the contract, incur expenses and devote all its energies to the chugger program resulting in actual and punitive damages. This Count is clearly barred by *res judicata*. It is an action asserting a legal theory arising out of the same operative nucleus of facts as the first case. It cannot be entertained at this time. Brown v. Felsen, 442 U.S. 127, 131, 99 S.Ct. 2205, 2209, 60 L.Ed.2d 767 (1979). Manning v. City of Auburn, 953 F.2d 1355 (11th Cir. 1992); Olmstead v. Amoco Oil Co., 725 F.2d 627 (11th Cir. 1984).

B. In the Inducement of the Settlement.

The evidence as to this aspect of the case centers on the allegation that Defendant withheld production of documentary evidence in the prior litigation which if known to Plaintiffs would have materially affected their analysis of the settlement value of the case. The documents in question are the "Carlson memo" dated August 10, 1987 (Exhibit "A" to Klosinski Affidavit dated March 30, 1990, Document 26 in Adversary Proceeding #89-1096, Document 24 in Adversary Proceeding #89-1097) and the "side letter agreement" dated August 17, 1982 (Exhibit P-9 to Bell Affidavit dated February 18, 1991, Document 81 in Adversary Proceeding #89-1096, Document 79 in Adversary Proceeding #89-1097).⁴

The evidence establishes that Plaintiff was represented in the District Court litigation by attorneys Curry, Klosinski and Overstreet and that none of them were aware of the Carlson memo at the time the case was settled. However, it is uncontradicted that this is an internal Sunkist memo obtained from its files and there is no evidence that Lipton ever had a copy of it. Therefore its non-production by Lipton cannot form the basis of an allegation of fraud in the inducement of settlement.⁵

Insofar as the "side letter agreement" (Exhibit P-9 to Bell Affidavit, Documents 81 in Adversary Proceeding #89-1096 and 79 in Adversary Proceeding #89-1097; letter of Dolph Van Arx dated August 17, 1982) is concerned the affidavits of Klosinski, supra, and Overstreet (Document 81 in Adversary Proceeding #89-1097 and Document 83 in Adversary Proceeding #89-1096) assert unqualifiedly that Lipton did not produce it. It is conceded, however, that Klosinski was not present for the document production, and

⁴ In fact, it is alleged that a number of other Lipton documents were not produced. *See* Overstreet affidavit dated February 20, 1991, paragraph 2; Curry affidavit dated February 20, 1991, paragraph 4. However, neither affidavit establishes that production was withheld. Rather, the attorneys "do not recall" seeing the documents. Any inference of non-production is wholly dispelled by the affirmative representations of Defendant, most recently made at the May 28, 1992, hearing by Charles C. Stebbins, III, counsel to Defendant, that all the documents in question were produced. On this record, I can only find that a material fact exists over the non-production of the "side letter agreement," not any of the other documents.

⁵ Moreover, if anything, the Carlson memo reveals that Lipton believed, until at least August, 1987, that it was within its rights to do business with Evergreen utilizing soft drink bottlers and openly advised Sunkist of its intent to do so. Thus, the memo tends to negate the allegations that Lipton acted fraudulently when it allegedly made the same representation to Evergreen at an earlier date.

that only selected documents were copied by Plaintiffs. Thus, the fact that the document is not part of Plaintiffs file, and Klosinski's lack of knowledge of the document are not probative of the allegation that it was withheld by Lipton. Overstreet's affidavit, however, is unequivocal and he was present at the document production. Lipton, through Hicks and Stebbins, contends that the document was in fact produced. This creates an issue of fact. However I conclude that it is not an issue of material fact because I am persuaded that the existence of the letter and the facts contained in it on which allegations of fraud could have been based were known to Plaintiffs during the pendency of the prior litigation. (*See* Appendix "A" to Defendant's reply brief filed May 2, 1990, Document 38 in Adversary Proceeding #89-1096 and Adversary Proceeding #89-1097; Defendant's supplemental brief filed September 9, 1991 and exhibits, Document 102 in Adversary Proceeding 89-1096 and Document 101 in Adversary Proceeding 89-1097).⁶ Nevertheless, at no time did Plaintiffs seek production of the letter or move to amend their complaint in the District Court litigation to assert an action for fraud, nor did the Plaintiff's outline of its case set forth in the pre-trial order assert a claim for fraud. As a claim that could have been made in the prior case this theory of recovery is barred by *res judicata* based on authorities previously cited, notwithstanding its present characterization as fraudulent inducement to settle.⁷

Finally, the only appropriate method to raise the non-production of a document, amounting to fraudulent inducement to settle is the procedure provided in F.R.Civ.P. 60(b) which must be addressed directly to the United States District Court. *See generally* 11 Wright & Miller, Federal Practice and Procedure, §2860; §2864; §2870 (1973). Of particular note is the fact that Rule 60(b) abolishes the "shadowy, uncertain

⁶ In this letter Van Arx, on behalf of Lipton, advises Sunkist that it will not market beverages using soft drink bottlers and will not employ confusingly similar trademarks to those used for Sunkist and Diet Sunkist products. In the deposition of Barry Mino (Lipton) Evergreen's counsel, Mr. Overstreet, questioned Mino about the contents of Mino's notes taken at the meeting with Carlson (which is the subject of the Carlson memo) and Mino specifically testified that Dolph van Arx (Lipton) had written a letter to Mr. [Carnine] (Sunkist) on the subject of utilization of soft drink bottlers (the letter in question). Mino also revealed that Lipton's in-house counsel and Sunkist disputed Evergreen's right to use soft drink bottlers (Deposition pages 94-95). Even though some Lipton officials believed that the restrictions contained in the letter had been waived by Sunkist, as evidenced by paragraph 3 of the Carlson memo, the existence of the letter and the possible illegality of the Evergreen/Lipton program was revealed to Evergreen's counsel during discovery in the previous case. (*See* in particular Exhibit 1 to Appendix II of Document 102).

⁷ Alternatively, I hold that with the knowledge of these facts Plaintiff made a binding election in the prior case to recover for breach of contract rather than to sue for fraud. *See generally* City Dodge, Inc. v. Gardner, 130 Ga. App. 502, 503 (1); 203 S.E.2d 729 (1973). A party must elect to rescind in a timely manner upon learning of the fraud or affirm the contract and sue for fraudulent misrepresentation. *Id.* *See also* Roller Ice, Inc. v. Skating Clubs of Georgia, Inc., 192 Ga. App. 140 (384 S.E.2d 235) (1989). Plaintiff is precluded from pursuing a fraud claim at this stage of the litigation, having made the election not to do so in the prior case.

and somewhat arbitrary" distinction between intrinsic and extrinsic fraud and preserves the inherent power of a court, independent of Rule 60(b)'s express terms to "entertain an independent action to relieve a party from a judgment . . . for fraud upon the court." *Id.* at §§2861, 2870. If, as Evergreen contends, the settlement was induced by fraud, it may file an extraordinary motion to set aside the judgment under F.R.Civ.P. 60(b), which should be addressed to the District Court in which the alleged fraud occurred and in which the judgment was procured. Villarreal v. Brown Express, Inc., 529 F.2d 1219, 1221 (5th Cir. 1976).

C. RICO claims.

Plaintiff's RICO claims are without merit. Plaintiff asserts that Defendant violated state and federal RICO laws. According to Plaintiffs, Defendants used the mail and telephones to fraudulently induce Plaintiffs to enter the contract and in making false representations to the Plaintiffs. Such a claim is equally susceptible to the *res judicata* bar as the common law fraud claim. It is founded on the same operative nucleus of facts and cannot be raised and relitigated now. Israel Discount Bank Ltd. v. Entin, 951 F.2d 311 (11th Cir. 1992). *See also* I. A. Durbin, Inc., v. Jefferson National Bank, 793 F.2d 1541, 1549 (11th Cir. 1986).

Moreover, the RICO laws prohibit a "pattern of racketeering activity," which is defined as "at least two acts of racketeering activity." Aldridge v. Lily-Tulip, Inc., Salary Retirement Plan Benefits Committee, 741 F.Supp. 906, 911 (S.D.Ga. 1990) (Bowen, Judge). Racketeering activity includes any type of criminal conduct described in 18 U.S.C. Section 1961(1), known as predicate acts. Two predicate acts alone do not constitute a pattern of racketeering activity prohibited by the RICO statutes. *Id.* at 911. Rather, "plaintiff must show that the two predicate acts are related and either amount to or constitute a threat of continuing racketeering activity." *Id.* "'Continuity' is both a closed and open-ended concept, referring to either a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." Aldridge, 741 F.Supp. at 911, citing H. J., Inc., v. Northwestern Bell Telephone Co., 492 U.S. 229, 241-42, 109 S.Ct. 2893, 1902, 106 L.Ed.2d 195 (1989).

In Aldridge Defendants argued that the alleged scheme ran from June 1982 to December 1982 and did not constitute a pattern of racketeering activity. The District Court disagreed holding that a

pattern of racketeering activity was established, continued over a substantial period of time, and included the acts of concealment over a several year period. The motion to dismiss the RICO claims was overruled. Noting, however, that the Eleventh Circuit had failed to address the "pattern" requirement for RICO claims, Judge Bowen allowed an immediate appeal of his decision. The Eleventh Circuit reversed the decision not to dismiss the RICO claim. According to the Eleventh Circuit:

We must conclude on this record that Lily's alleged illegal activity was not a pattern of racketeering of the closed-ended type. We find that it was accomplished in too short a period of time, approximately six months, in order to qualify as a pattern of racketeering activity . . . As the Court stated in *H. J. Inc.*, "predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy the pattern requirement." 109 S.Ct. 2401.

Aldridge v. Lily-Tulip, Inc., 953 F.2d 587, 593 (11th Cir. 1992).

In light of the Eleventh Circuit's holding in Aldridge, I conclude that Plaintiffs have not established a "pattern" of racketeering activity by the Defendants. The parties entered into a contract in December 1986. Both parties performed under the contract in 1987. In August 1988, Lipton ordered Evergreen to halt production of unfilled purchase orders of juice. Evergreen was out of business and insolvent by December 31, 1988, and was placed in an involuntary bankruptcy proceeding by March 1989.

Lipton's allegedly fraudulent actions, performance under the contract, and breach are not sufficient predicate acts to "institute a threat of continuing racketeering activity." Aldridge, 704 F.Supp. at 911. The actions at issue were accomplished over a very few months at most while the contract was being negotiated and did not threaten any future criminal conduct. Aldridge v. Lily-Tulip, Inc., 953 F.2d at 593. Therefore, Plaintiff's RICO claims should be dismissed.⁸

Finding no genuine issue of material fact, and all questions of law having been resolved

⁸ Georgia's RICO act is similar to the Federal RICO act. Dover v. State, 192 Ga. App. 429, 385 S.E.2d 417 (1989). *See* 18 U.S.C. 1961, et seq.; O.C.G.A. § 16-14-1, et seq. Both statutes prohibit a "pattern of racketeering activity." However, Georgia courts, unlike the federal courts, require the two predicate acts to be interrelated. *Id.* *See also* United States v. Elliot, 571 F.2d 880, 899, note 23 (5th Cir. 1978). The Georgia statute is also broader in another respect as the law makes it unlawful to acquire real property, personal property or money with proceeds from racketeering activity. Dover v. State, 192 Ga. at 430. *See also* O.C.G.A. § 16-14-4. Plaintiff has failed to show that Defendant's acts violated either the Georgia RICO law or the Federal RICO statute.

in favor of Defendant, Defendant's Motions for Summary Judgment are granted.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Defendant's Motions for Summary Judgment are granted and the cases are dismissed with prejudice.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of July, 1992.